

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Child and Family Services Agency**  
**Office of General Counsel**



MLA 06-04  
April 11, 2006

**MEMORANDUM OF LEGAL ADVICE**

**Issue**

Can an individual who is awarded a sole source contract be considered an employee or volunteer of the Child and Family Services Agency ("CFSA")?

**Conclusion**

For the reasons stated below, we have concluded that an individual who is awarded a sole source contract, a contractor, cannot be considered an employee of the CFSA since he or she is not appointed and compensated under the District government personnel statute; nor can he or she meet the required legal criteria to be considered a District government volunteer.

**General Provisions - Employees**

Generally, the Mayor has authority to administer the personnel functions of the District of Columbia government covering employees of all departments, boards, commissions, offices and agencies, except as otherwise provided by law (D.C. Official Code § 1-204.22) (2001). Legal provisions pertaining to employees of the District government are contained in the District of Columbia Government Comprehensive Merit Personnel Act of 1978 ("CMPA"), as amended (D.C. Law 2-139; D.C. Official Code §§ 1-601.01-1-636.03, 1-602.01) (2001), and the D.C. Personnel Regulations.

For the purposes of the CMPA, the term "employee" is defined as an individual who performs a function of the District government and who receives compensation for the performance of such services (D.C. Official Code § 1-603.01(7)) (2001). Compensation is pay that is received under the authority of the CMPA (D.C. Official Code § 1-611.01 *et seq.*) (2001).

As cited above, the Mayor is the personnel authority for all employees of the District government, except as provided by law (D.C. Official Code § 1-604.06) (2001). The CFSA is such an exception. While it is a subordinate agency that is under the direct administrative control of the Mayor, the personnel authority for the CFSA is the Director of the CFSA (D.C. Official Code §§ 1-603.01(17)(XX), 1-604.06(b)(17)), 4-1303.01a(a), 4-1303.03(a-1)(8)) (2001 and Supp. March 2005). Accordingly, the Director of the CFSA has the authority to administer all or part of a personnel management program under the CMPA and to implement the ensuing rules and regulations for all

employees of the agency (D.C. Official Code §§ 1-603.01(14), 1-604.06(b)(17), 4-1303.03(a-1)(8)) (Supp. March 2005). With regard to most of the other subordinate agencies, the Mayor may delegate his or her personnel authority in whole or in part exclusively to the Director of Personnel (D.C. Official Code § 1-604.02) (Supp. March 2005).

### **General Provisions - Volunteers**

Legal provisions pertaining to volunteers of the District of Columbia government are contained in D.C. Official Code § 1-319.01 *et seq.* (2001) and Chapter 35 of the D.C. Personnel Regulations, Voluntary Services ("regulations"). The District government is permitted to utilize volunteer citizens in as many governmental programs as is practicable to serve the interests of the community (D.C. Official Code § 1-319.01) (2001).

The term "volunteer" is defined as a person who donates his or her services to a specific program or department of the District of Columbia government, by his or her free choice and without payment for the services rendered (D.C. Official Code § 1-319.05(2)) (2001). In contrast, an employee is paid by the District government from grant or appropriated funds for his or her services (D.C. Official Code § 1-319.05(1)) (2001).

The reimbursement of the actual expenditures of a volunteer incurred on behalf of the District government does not make that person an employee (D.C. Official Code § 1-319.05(2)) (2001). Also, volunteers are not eligible for federal or District benefits, but they are considered employees under the District government disability compensation provisions ((D.C. Official Code §§ 1-319.03(b), 1-623.01(1)(B) (2001); Chapter 35, §§ 4000.8- 4000.9 of the regulations). Likewise, volunteers are considered employees of the District of government with regard to claims of negligent damage to or loss of property, and tortious injury caused while acting under the supervisor and control of the District government (D.C. Official Code §§ 1-319.03(c), (d)) (2001). In addition, volunteers are held to the same standards of conduct as District employees, including certain conflict of interest and political activity provisions (D.C. Official Code § 1-319.03(a) (2001); Chapter 35, §§ 4000.6, 4000.7, 4000.15 of the regulations).

No volunteer is to be used to fill any position or perform any service which is currently being performed by an employee of the District government (D.C. Official Code § 1-319.01) (2001). Volunteers must be assigned to an employee of the agency utilizing the volunteer's services, who is to be responsible for assignment of duties; supervision and control of the activities of the volunteer; evaluation of performance; and establishment and monitoring of the hours during which voluntary services are performed, if appropriate (§ 4000.14 of the regulations). Under the regulations (§§ 4000.4, 4000.16-4000.19), qualified volunteers may be utilized to perform the following:

- Any service or function which augments or supplements an existing function, service, or program which is staffed by employees of the District government;
- Any service or function which creates a community service capability which would not be available under existing programs or within the level of available resources;
- The duties assigned to a regular employee during the temporary absence of the regular employee, provided the volunteer is qualified to perform the assigned duties; or

- The duties assigned to a regular employee on a temporary basis during periods of heavy workload or to assist in relieving an existing backlog of work.

Prior to engaging in the performance of voluntary services for the District government, each volunteer must sign a statement which acknowledges that he or she: (1) has been informed of the nature and scope of the voluntary services to be performed; (2) has been informed of and understands all of the provisions of the applicable statute, regulations, and agency guidelines for the use of volunteers; and (3) agrees to perform voluntary services under the terms and conditions set forth in such provisions (§ 4000.25 of the regulations).

Further, each agency has discretion to accept and utilize the services of any person on a voluntary basis and to discontinue using such services at any time for any reason; this will not be considered an adverse action and does not give rise to any right or process of appeal (§§ 4000.12-4000.13 of the regulations). Also, while it is the Director of Personnel who establishes the guidelines for the acceptance and utilization of voluntary services in an agency, including guidelines for the deployment and supervision of volunteers, agency heads may supplement such guidelines when appropriate (§ 4000.21 of the regulations). However, no agency head, supervisor, or other employee of the District government is authorized to limit, waive, amend, or otherwise modify the restrictions and requirements on the use of voluntary services without the approval of the Director of Personnel (§ 4000.23 of the regulations).

### Analysis

The Director of the CFSA does not only have personnel authority to hire, retain, and terminate employees, but he or she has procurement authority in contracting and contract oversight and can exercise such authority to carry out the purposes of the agency by entering into contracts (D.C. Official Code §§ 4-1303.01 *et seq.*, 4-1303.03(a), (a-1)(8), (9)) (Supp. March 2005). When an individual executes a sole source contract<sup>1</sup> with the CFSA, he or she becomes a contractor (see D.C. Official Code § 2-301.07(16)) (Supp. March 2005).

On occasion, a contractor may raise the claim that he or she is an employee of an agency.<sup>2</sup> However, under District government personnel statute, contractors cannot be considered CFSA employees. In order to establish a District government employment relationship, the Director, as the personnel authority of the CFSA, must appoint and compensate the individual under the CMPA and the D.C. Personnel Regulations. This is not done in contractual arrangements which are made under the auspices of contracting and procurement provisions.

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<sup>1</sup> The term "sole source" means that a single source in a competitive marketplace can fulfill the specifications of a contract or is found, for a justifiable reason, to be most advantageous to the District government for the purpose of contract award (D.C. Official Code § 2-301.07) (2001). Such contracts are noncompetitive (D.C. Official Code § 2-303.05) (2001).

<sup>2</sup> Under the CMPA, an "agency" is defined as any unit of the District government required by law, the Mayor, or the Council to administer any law, rule, or any regulation adopted under authority of law, and shall include any unit of the District government created by the reorganization of one or more of the units of an agency and any unit of the District created or organized by the Council as an agency (D.C. Official Code § 1-603.01(1)) (2001). Under the contracting and procurement statute, an "agency" is any officer, employee, office, department, board, commission, or entity of the District as described (D.C. Official Code § 2-301.07(2)) (2001). Contractors are not included in either of these statutory definitions of agency.

Further, when determining whether an individual is an employee or an independent contractor, courts look at the extent of the employer's right to control the means and manner of the worker's performance, and also weigh the following factors: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the employer furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the employer; (9) whether the worker accumulates retirement benefit; (10) whether the employer pays social security taxes; and (11) the intention of the parties. Zhengxing v. Nathanson, 215 F. Supp. 2d 114, 117 (D.C. Cir. 2002); Redd v. Summers, 232 F.3d 933, 938 (D.C. Cir. 2000); Spirides v. Reinhardt, 613 F.2d 826, 831-832 (D.C. Cir. 1979).

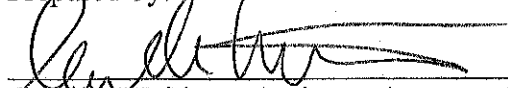
In light of these factors, contractors of the CFSA are unlike District government employees because they do not receive benefits such as leave or retirement; they are paid for their services pursuant to contract terms; and the contract is terminated pursuant to contract provisions. Also, although contractors usually interact with and provide reports to CFSA staff, their performance is not controlled or supervised by staff. Instead, they control their own performance under the terms and conditions of the contract, which is monitored by CFSA staff. For reasons such as these, a contractual agreement does not establish a District government employment relationship.

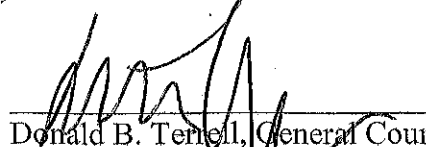
Further, contractors cannot be considered District government volunteers because their contractual services do not meet the criteria set forth for volunteers in D.C. Official Code § 1-319.01 *et seq.* (2001) and Chapter 35 of the regulations. Contractors cannot be deemed volunteers given that they are paid for their services, whereas volunteers are not paid. Also, a contract would go beyond the bounds and impermissibly amend and modify the restrictions and requirements set forth in the statutory, regulatory or other guidelines for volunteers.

In addition, unlike volunteers, contractors are not under the direct supervision and control of CFSA staff. They are not given assignments by staff and their hours are not monitored as they would be for employees or volunteers. Also, contractors do not agree to perform services under the terms and conditions set forth in the volunteer provisions. Instead, contractors agree to contractual requirements, terms, and conditions. Moreover, while the services of a volunteer may be discontinued at any time and for any reason, a contract is terminated pursuant to stated or legal provisions.

Accordingly, for the reasons stated above, individuals who are awarded sole source contracts are not, and cannot be considered, employees or volunteers of the CFSA.

Prepared by:

  
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